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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GREGG FOREST PRODUCTS, INC.,

Plaintiff and Respondent,

v.

JOSE GARCIA SPARZA,

Defendant and Appellant.

D043732

(Super. Ct. No. GIC756240)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

One of the fundamental precepts of appellate review is the settled rule that we will not consider matters outside the record. Here appellant's arguments are based entirely on matters which are not reflected anywhere in the record. Accordingly, we must affirm the judgment.

SUMMARY

In 1999 plaintiff and respondent Gregg Forest Products, Inc. (Gregg Forest), supplied a furniture manufacturer, Sparme Industrial, Inc. (Sparme Industrial), with \$134,315.16 in lumber. Sparme Industrial failed to make any payment on the lumber it received. In April 2000 Sparme Industrial gave Gregg Forest a note in the amount of \$134,315.16. The note was guaranteed by the principal of Sparme Industrial, defendant and respondent Jose Garcia Sparza.

Sparme Industrial made no payments on the note. In September 2000 Sparza filed a Chapter 13 bankruptcy petition. In October 2000 Gregg Forest filed a collection action against Sparme Industrial. In April 2001 the Chapter 13 proceeding was dismissed and Sparza was added as a defendant in the collection action.

On August 23, 2001, the day before trial in the collection action, Sparza filed a Chapter 7 bankruptcy petition. August 28, 2001, while Sparza's bankruptcy Chapter 7 petition was pending, Gregg Forest obtained a judgment against Sparma Industrial in the amount of \$166,000.

In December 2001 Sparza's Chapter 7 bankruptcy proceeding was dismissed. At that point Gregg Forest and Sparza entered into a stipulation for entry of judgment. Sparza stipulated to entry of a judgment in the amount of \$166,000 plus interest and attorney fees; for its part Gregg Forest agreed that it would not seek entry of the judgment so long as Sparza paid it a total of \$50,000. The stipulation required that the \$50,000 be paid in monthly installment payments of \$2,000 each commencing on January 5, 2002. However, the stipulation further provided that in the event of any default on Sparza's part

and upon 10 days written notice of default, Gregg Forest could enter the judgment for the full \$166,000 due plus interest at the legal rate and less any amounts paid by Sparza.

Sparza made 21 timely payments. However, Sparza made no payment in October 2003 or November 2003. On November 13, 2003, Gregg Forest gave Sparza notice that he had defaulted under the terms of their agreement.

On December 11, 2003, Gregg Forest appeared ex parte in the trial court and asked that the stipulated judgment be entered. Sparza's counsel also appeared at the ex parte hearing. According to the brief he filed in this court, at the ex parte hearing Sparza's counsel argued that because of a fire at property Sparza owned and difficulty Sparza had in obtaining insurance proceeds, Gregg Products had orally agreed that as long as the balance of the \$50,000 due under the stipulation was paid by December 5, 2003, Gregg Products would refrain from entering the stipulated judgment. According to his brief, Sparza's counsel further argued that on December 5, 2003, Sparza sent Gregg Forest a cashier's check for \$8,000 by certified mail but that Gregg Forest had refused to accept the certified mail. Sparza contends he asked the trial court to conduct an evidentiary hearing on his contentions.

At the ex parte hearing Gregg Forest's counsel denied the existence of any agreement to accept late payments. Gregg Forest's counsel also argued that the ex parte application which was served at the time of the hearing fully explained why any payment was refused.

On December 11, 2003, the trial court entered the stipulated judgment requested by Gregg Forest. After including interest and crediting the amounts paid by Sparza, the judgment entered totaled \$161,752.23.

The record does not reflect any post-judgment effort by Sparza to vacate the judgment or obtain any other relief from it. Rather, Sparza filed a notice of appeal on February 7, 2004.

DISCUSSION

On appeal Sparza argues that entry of the judgment was invalid because Gregg Forest orally agreed to forego collection so long as any remaining balance on the \$50,000 due under the parties' stipulation was paid by December 2003 and that in fact he attempted to make the required payment but that his payment was returned.¹ Relying on Code of Civil Procedure section 2076,² Sparza further argues that in failing to explain why it refused to accept the \$8,000 payment he tendered on December 5, 2004, Gregg Forest waived its right to demand full payment under the terms of the stipulation for judgment.

¹ Civil Code section 1698, subdivision (b), states: "A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties."

² Code of Civil Procedure section 2076 states: "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

Other than counsel's statements in his brief and references in the minute order to arguments counsel made at the ex parte hearing, there is nothing in the record which reflects either the oral agreement Sparza asserts or the payment Sparza contends he tendered. At the time of the ex parte hearing counsel offered no documentary evidence of either the agreement or the tendered payment. As the court in *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364, noted in a somewhat different context: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." (See also rule 14(a)(2)(C), Cal. Rules of Court; 9 Witkin, Cal. Procedure, Appeal, § 328, pp. 369-370.) Here we are controlled by the second of these immutable rules: because there is no evidence in the record of either the oral modification or the tendered payment, for our purposes they did not happen. As a consequence we cannot reach the merits of Sparza's contention that he met the requirements of any oral modification of the stipulation or that Gregg Forest waived the right to demand payment of the entire \$166,000.

Although not articulated clearly, Sparza's brief suggests that notwithstanding his failure to offer any proof of the oral modification or tendered payment at the ex parte hearing, the trial court should have granted his request for an evidentiary hearing on those matters. Under the circumstances disclosed on the record, we find no abuse of discretion in the trial court's unwillingness to conduct an evidentiary hearing. Under the terms of the stipulation Gregg Forest was only required to give Sparza notice of his default; once the 10-day default period passed, Gregg Forest was free to seek entry of the judgment

without any further notice or hearing. The obvious purpose of this provision was to provide Gregg Forest a certain and swift remedy in the event of default rather than expose it to the expense and delay of further litigation. Given the terms of the stipulation for judgment and their purposes, at the ex parte hearing Sparza bore the burden of showing some good cause for any further proceedings.

Sparza failed to demonstrate good cause for any further hearing. As Gregg Forest notes, it gave Sparza written notice of his default on November 13, 2003. That notice of default was clearly inconsistent with the terms of the oral agreement asserted by Sparza. Nonetheless at the time of the December 11, 2003, ex parte hearing, Sparza had not objected in writing to the notice of default. Sparza's failure to object to the notice of default, which under the terms of the stipulation had been served on his counsel, undermined his contention that any contrary oral agreement had been reached. As we have also noted, at the time of the ex parte hearing, Sparza presented no proof that he had tendered payment of \$8,000 to Gregg Forest. Indeed his brief only offers to show that he sent Gregg Forest certified mail which Gregg Forest refused. Given the lack of any documentation for his contentions and the clear terms of the stipulation he executed, Sparza did not provide the trial court with any good cause for further proceedings.³

Finally, we note that entry of the judgment, while depriving Sparza of the benefit of a substantial discount he had negotiated, was in no sense unjust or inequitable. Sparza

³ We note that although he could have established a fairly full factual record by seeking post-judgment relief and obtaining review from any order denying such relief, there is no indication in the record that Sparza attempted to do so.

has never disputed Sparme Industrial's liability for the \$134,000 in lumber delivered by Gregg Forest in 1999. Sparza has never asserted any defense on the merits to enforcement of the guaranty he signed in favor of Gregg Forest in 2000. Thus the amount of the judgment merely provides Gregg Forest with the amount it is owed, with interest at the legal rate.

Judgment affirmed. Respondent to recover its costs.

BENKE, Acting P.J.

WE CONCUR:

HUFFMAN, J.

McDONALD, J.